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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE SUNSHINE ANTHRACITE COAL COMPANY,
Appellant,

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the District of Arkansas,
Appellee.

No. 804.

Appeal from the District Court of the United States for the Eastern District of Arkansas, Western Division.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

I.

The District Court of the United States for the Eastern District of Arkansas, Western Division, filed no opinion at the time of entering final decree in this case. It did, however, file an opinion at the time of ruling on motion to strike, and this opinion is reported in 31 Fed. Supp. 125 (Advance Sheets).

II.

Jurisdictional statement has heretofore been filed and probable jurisdiction noted by this Court March 25, 1940.

1. The Bill of Complaint is in three paragraphs (R. 1, pp. 1-20, inc., 30-31) and challenges the constitutionality of the Bituminous Coal Act of 1937. It also challenges the construction placed upon said Act by taxing and administrative officers.

2. The order, judgment and decree sought to be reviewed was entered on the 16th day of February, 1940 (R. 1, pp. 50-51). Application for appeal was allowed on March 4, 1940 (R. 1, pp. 119-120).

3. Jurisdiction of this court is invoked under the act of August 24, 1937 [C-754, Section 3—50 Stat. 752, Title 28, U. S. C. A. Section 380 (a) (Pocket Pamphlet)]. Cases believed to sustain jurisdiction of the Supreme Court of the United States are: William Jameson Company, Inc. v. Henry Morgenthau, Jr., Secretary of the Treasury of the United States et al., 307 U. S. 171. International Ladies Garment Workers Union v. Donnelly Garment Co., 304 U. S. 243, 50 Sup. Ct. 675.

III.

CONCISE STATEMENT OF THE CASE.

This case presents questions both of construction and the validity of the Bituminous Coal Act of 1937. The declared purpose of the Act is to regulate the bituminous coal industry. The method of regulation, however, is entirely new and unusual. The Act does not purport to regulate all bituminous coal in interstate commerce, but divides the natural class of bituminous coal into two classes, code

and non-code, then proceeds to regulate the code members and permit the non-code members to go unregulated. Membership in the code is ostensibly voluntary. Non-code members are not prohibited from mining and shipping bituminous coal in any quantity or amount in interstate commerce. Appellant is a non-code member and produces semianthracite coal, and contends that, in any event, the Act is unconstitutional, invalid and void. On May 5, 1938, Appellee filed notice of tax lien, under the Internal Revenue Laws, in the amount of $15,488.62 (R. 1, pp. 45-46) and on May 9, 1938, Appellant filed in the District Court of the United States for the Eastern District of Arkansas, Western Division, petition to enjoin Appellee from attempting to enforce tax liability against Appellant. On June 3, 1938, after hearing by three-judge court, temporary injunction was issued restraining collection of the nineteen and one-half per cent tax levied by section 3 (b) of the Act (R. 1, pp. 26-27). By agreement with the court at that time Appellant has been paying, under protest, the one cent per ton tax levied by section 3 (a) of the Act. Appellee set up by way of answer in bar on the question of whether or not plaintiff's coal came within the purview of the statute, proceedings, findings and order or decree of the National Bituminous Coal Commission entered on hearing of petition for exemption by Appellant, and general investigation of coals in the Spadra coal field, Johnson County, Arkansas, determining that coal produced by plaintiff and by producers in the Spadra field was bituminous coal within the meaning of the Act (R. 1, pp. 21 to 26, 27 to 28, 39 to 40). This was an ex parte proceedings and Appellee was not a party to these proceedings. Appellant filed a motion to strike out all of that portion of the answer setting up and alleging above proceedings (R. 1, pp. 28 to 29), which said motion to strike was overruled by the three-judge court (R. 1, p. 31), and written opinion

filed therewith (R. 1, pp. 32 to 39), in which said opinion it was held that the proceedings before the National Bituminous Coal Commission were conclusive on the court in that hearing. Trial on the merits was held February 15th and 16th, 1940; at the trial Appellant offered evidence of Dr. George C. Branner, State Geologist of the State of Arkansas, as to qualifications, experience with and personal knowledge of the kind and quality of coal produced by Appellant, the technical meaning of the terms "bituminous, semi-bituminous and sub-bituminous coal," and the nature characteristics and history of the Spadra coal field (R. 1, pp. 108-112).. Appellant also offered evidence of Dr. Arno Fieldner, Chief Technological Branch and Chief Engineer Coal Division of the Bureau of Mines (R. 1, pp. 71 to 81), and Thomas A. Hendrichs, Geologist with the Geological Survey, United States Department of the Interior (R. 1, pp. 82 to 85), and analyses and official government publications and bulletins as to classification of coal produced by plaintiff (R. 1, pp. 85 to 105). All of the above evidence was by the court excluded on the ground that that question had been conclusively determined by the Bituminous Coal Commission in the Circuit Court of Appeals for the Eighth Circuit in the case of Sunshine Anthracite Coal Company against the National Bituminous Coal Commission, 105 Fed. (2d) 559. The Court; on February 16, 1940, filed in the above cause its Findings of Fact and Conclusions of Law (R. 1, pp. 49 to 50) and entered final judgment and decree (R. 1, pp. 50-51). The unreasonable, excessive and confiscatory nature of the so-called tax is obvious, and the Court found that Appellant had operated its property at a loss for the past three years (R. 1, p. 45) and could neither sell the property nor borrow money to pay the tax (R. 1, p. 45) and, at the time of entering said final decree, continued the injunction in force and effect for the period of thirty days from the entry of the decree to enable Appel-

lant to appeal to the Supreme Court of the United States, with a provision that if such appeal shall be perfected within said thirty day period, that said restraining order against the defendant shall remain in full force and effect until final disposition of said appeal. By its conclusions of law (R. 1, p. 49) the trial court held that the proceedings before the National Bituminous Coal Commission were conclusive on the court; that the so-called 19½ per cent tax levied by section 3 (b) of said Act was applicable to coal produced by plaintiff, although plaintiff was non-code member and that said Act was a constitutional and valid regulation of the coal industry, is reasonable and related to a proper congressional purpose, and does not violate the Fifth Amendment and contains no invalid delegation of legislative authority; that the taxing provisions of the Act are valid as affecting the valid regulatory purpose of the Act, and that the exception provided in section 3 (b) of producers who subscribe to the Bituminous Coal Code and are subject to the regulatory provisions of section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

IV.

Statute involved is the Bituminous Coal Act of 1937. For convenience, copy of the Act, omitting annex "Schedule of Districts," is attached to this brief as an appendix. Summary of the Act, with quotation of particular provisions involved in this litigation, is contained in the jurisdictional statement.

V.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

Appellant intends to urge all of the errors set forth in its Assignment of Errors, as follows:

"The three-judge District Court erred:

"1. In overruling plaintiff's motion to strike out of Defendant's answer those paragraphs of defendant's answer setting up and alleging proceedings, findings and order before the National Bituminous Coal Commission determining that plaintiff's coal and all coals produced in the Spadra field in Johnson County, Arkansas, to be bituminous coal within the meaning of the Bituminous Coal Act of 1937.

"2. In excluding, upon objection, plaintiff's evidence of characteristics, nature and prior technical meaning given to the words 'bituminous, semi-bituminous and sub-bituminous' by other departments of the government of the United States, and by the former National Bituminous Coal Commission.

"3. In admitting in evidence, over plaintiff's objection, certified transcript of proceedings had and held before the National Bituminous Coal Commission for the purpose of determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the purpose of hearing applications for exemption, including that filed by The Sunshine Anthracite Coal Company.

"4. In holding, in Conclusion of Law No. 3, that the District Court had no jurisdiction to determine whether 'Plaintiff's coal is bituminous coal,' as defined by the Bituminous Coal Act of 1937. Under section 4-A and section 6 of the Act, the findings and order of the National Bituminous Coal Commission declared plaintiff's coal to be 'bituminous coal' within

the meaning of the Act, was an order which the Commission had jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

"5. In holding, in Conclusion of Law No. 4, that in any event the issue whether plaintiff's coal is 'bituminous coal' as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission denied plaintiff's application for exemption from the Act.

"6. In holding, in its Conclusion of Law No. 5, that section 3 (b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

"7. In holding, in its Conclusion of Law No. 6, that the Bituminous Coal Act of 1937, c. 127, 75th Congress, first session, 250 Statutes 72, is constitutional.

"8. In holding, in its Conclusion of Law 6 (a), that the regulatory provisions in section 4 of the Bituminous Coal Act of 1937 are a valid exercise of the power of Congress to regulate interstate commerce and intrastate commerce directly affecting interstate commerce.

"9. In holding, in its Conclusion of Law 6 (b), that the establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable, is related to a proper congressional purpose and does not violate the Fifth Amendment.

"10. In holding, in its Conclusion of Law 6 (c), that the standards of the Bituminous Coal Act of 1937 are sufficiently definite, and that said act contains no invalid delegation of legislative authority.

"11. In holding, in its Conclusion of Law 6 (d), that whether or not the taxing provisions of section 3 (b) could be otherwise sustained, since the regulatory provisions of the act are valid, the taxing provisions of the act are likewise valid as affecting the valid regulatory purpose of the act.

"12. In holding, in its Conclusion of Law 6 (e), that

the exemption from the tax imposed by section 3 (b) of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

"13. In holding, in its Conclusion of Law No. 7, that the bill of complaint should be dismissed.

"14. In refusing to make the temporary injunction heretofore granted permanent."

VI.

SUMMARY OF ARGUMENT.

POINT 1.

Proceedings before the National Bituminous Coal Commission in the matter of the Investigation to Determine whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the further purpose of hearing applications for exemption, as provided for by orders Nos. 28 and 53, and in the matter of the application of Sunshine Anthracite Coal Company for exemption under subsection (b) of section 17 of the Bituminous Coal Act of 1937 et al., are not conclusive on the court, and are not admissible in evidence in this case for the following reasons:

(a) This is not a petition to review an order, judgment or decree of the National Bituminous Coal Commission. Taxes levied under section 3 of the Act (now levied under Chapter 33 of Internal Revenue Code of 1939) are levied, assessed and collected by the Commissioner of Internal Revenue in like manner as other governmental taxes. Levy, assessment and collection by Commissioner of Internal Revenue is not in anywise dependent on action by the National Bituminous Coal Commission or its successor.

This case, therefore, does not challenge either directly or indirectly any order of the Commission, and, in any event, there is no privity between the National Bituminous Coal Commission or its successor and the Appellee herein.

(b) No power to hold hearing and make determination of what is or is not bituminous coal within the meaning of the Bituminous Coal Act of 1937 is delegated by said Act, either directly or inferentially, to the National Bituminous Coal Commission or its successor.

(c) If statute be construed as delegating to National Bituminous Coal Commission or its successor power to determine the object to which law is to be applied, without standard fixed, it renders statute invalid as unlawful delegation of legislative power.

(d) If statute be construed as delegating power to exercise the judicial function of construction of the Act, such delegation renders the statute invalid as an unlawful delegation of judicial power.

(e) Construction of the act as to the meaning of "bituminous, semi-bituminous and sub-bituminous" is a judicial function and cannot be delegated to an administrative tribunal.

POINT 2.

Section 3 (b) of the Act levies the so-called tax of 19½ per cent on "the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the Code provided for in section 4, or of the provisions of section 4-A." Since Appellant is a noncode producer, sale of Appellant's coal is not subject to the application or provisions of the Code provided for in section 4 or of the

provisions of section 4-A, and therefore is not subject to the so-called 19½ per cent tax.

POINT 3.

Bituminous Coal Act of 1937 is unconstitutional, invalid and void for the following reasons:

(a) "The division of a natural class, bituminous coal, into artificial classes of code and non-code for regulatory purposes is unreasonable, arbitrary, discriminatory, and capricious, and, therefore, illegal and in violation of the Fifth Amendment of the Constitution of the United States."

(b) The so-called 19½ per cent tax on sale price of coal is obviously not a tax, but a confiscatory penalty assessed without fault on the part of the Appellant. Exemption from said so-called tax is based not upon difference in either conduct or product, but solely upon membership in the code. Such classification for exemption purposes is clearly unreasonable, arbitrary, discriminatory and capricious, and not in any wise a proper method of accomplishing a proper congressional purpose, and violates the Fifth Amendment to the Constitution of the United States. Membership or nonmembership in an organization certainly cannot be a proper basis for classification either for regulation or taxation purposes.

(c) Congress is without power to fix minimum prices for Bituminous Coal sold in interstate commerce.

VII.

ARGUMENT.

POINT 1.

Assignment of errors Nos. 1 to 5, inclusive, present the single question of whether or not proceedings before the National Bituminous Coal Commission were conclusive on the trial court, and will be considered together.

The Record.

In order to direct the Court's attention to that part of the record presenting the first five assignments of error, we make the following statement of the record:

Appellee filed answer (R. 1, pp. 21 to 26), first supplemental answer (R. 1, pp. 27-28), and supplemental answer to third paragraph (R. 1, pp. 39-40). Said answers denied the essential allegations of the complaint, and in addition, in paragraphs 30 to 37, set up as conclusive on trial court proceedings before the National Bituminous Coal Commission (R. 1, pp. 24-28). Plaintiff filed motion to strike all of said paragraphs setting up said proceedings (R. 1, pp. 28-29), which motion was overruled by the Court (R. 1, p. 31). At the trial of said cause evidence was offered and, upon objection, excluded by the Court, as follows: Expert evidence as to technical meaning, history, nature, characteristics and prior definition of the term "bituminous, semi-bituminous and sub-bituminous" of Dr. George C. Branner (R. 1, pp. 108-112), Arno Fieldner (R. 1, pp. 71-81), Thomas A. Hendrichs (R. 1, pp. 82-85); also Appellant offered chemical analysis of coal produced by Appellant (R. 1, pp. 85-86; R. 2, pp. 25-30), official government bulletins showing classification of Appellant's coal prior to Bituminous Coal Act of 1937 (R. 1, pp. 86-98),

and order of National Bituminous Coal Commission organized under the Act of 1935 construing the words "bituminous, semi-bituminous and sub-bituminous coal" as used in the Act of 1935 (R. 1, pp. 98-103). Objection in each instance was substantially as follows:

> "We object to the introduction of this evidence on the ground that all of it goes to the question of the character of the plaintiff's coal, and that question has been conclusively determined by the Bituminous Coal Commission in the Circuit Court of Appeals for the Eighth Circuit in the case of Sunshine Anthracite Coal Company against the National Bituminous Coal Commission, 105 Fed. (2d) 559, and it is outside of the scope of the issues before this Court as determined in its decision on January 8, 1940" (R. 1, p. 71).

Appellee offered in evidence certified copy of the transcript of the record in the case of the Sunshine Anthracite Coal Company v. Harold L. Ickes (R. 1, p. 112, all of Vol. 2), and over Appellant's objection same was admitted and read in evidence (R. 1, p. 113). The Court's conclusions of law Nos. 3 and 4 (R. 1, p. 49) present the same question.

This Is Not a Petition to Review an Order, Judgment or Decree of the National Bituminous Coal Commission.

The so-called taxes herein involved were levied under section 3 of the Bituminous Coal Act of 1937. (This section has been repealed and the taxes are now levied by virtue of Chapter 33, sections 3520 to 3528, inclusive, of the Internal Revenue Code of 1939 [U. S. C. A., Title 26, Secs. 3520-3528, 53 Stat. 430].) Specific provisions of the law require that the taxes be assessed and collected by the Commissioner of Internal Revenue "Under such regulations and in such manner as shall be prescribed by the

Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury." All of the taxing provisions are contained in section 3 of the Act, and the sole duty of the National Bituminous Coal Commission or its successor in connection with the assessing or collecting of the tax is contained in section 3 (b) of such Act, and reads as follows:

> "In the case of any producer who is a Code member as provided in section 4, or is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the Code of coal produced by him shall be exempt from the tax imposed by this sub-section."

By the terms of the Act the tax is assessed and collected in the same manner and by the same department as collects other governmental taxes, with the same power to the tax gathering department to adopt its own regulations. The original tax involved in this litigation was assessed by the Commissioner of Internal Revenue; on May 3, 1938, Appellee served notice of taxes on Appellant; on May 5, 1938, filed a lien for the taxes under the Internal Revenue laws. At that time no action of any kind or nature had been taken by the National Bituminous Coal Commission, and none was taken by the Commission until August 31, 1938. Clearly, it was the intent of Congress that these so-called taxes should be assessed and collected in like manner as other government revenues. It would seem utterly impossible to gather from these provisions any intent on the part of Congress to make the Secretary of the Treasury or the Commissioner of Internal Revenue, or the tax gathering department of the government in any wise subordinate to or dependent upon any action of the Commission or its successor. The intent is clearly demonstrated by the fact that Congress in the Revenue Act of 1939,

Chapter 33, sections 3520 to 3528, inclusive, repealed section 3 of the Bituminous Coal Act of 1937, and re-enacted the taxing provisions as a part of the Internal Revenue Code of 1939. It seems obvious, therefore, that these so-called taxes are neither levied, assessed nor collected by reason of any order or finding of the National Bituminous Coal Commission or its successor, and this cause is neither a direct nor collateral attack upon any finding or order of the Commission or its successor. Clearly, the Commissioner of Internal Revenue did not construe the Act as requiring any action on the part of the National Bituminous Coal Commission before the tax was assessed.

If the proceedings before the National Bituminous Coal Commission set up in the answer are conclusive on the trial court in this case, it must be by reason of the doctrine of res judicata. In order that a judgment may work an estoppel under that doctrine, three essentials must be present: (1) parties must be the same; (2) subject matter must be the same; (3) the Court or tribunal rendering the judgment must have jurisdiction of the cause. In the case now under consideration not one of these essential requirements is present.

Parties Not the Same.

That the parties in the proceedings before the National Bituminous Coal Commission and in this cause were not the same is obvious. Appellee contends, however, that privity existed between the National Bituminous Coal Commission and the Appellee. This is seemingly based upon the contention that the powers conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue (and subordinately upon the Appellee) with respect to the tax levied by section 3 of the Bituminous Coal Act are in some manner dependent upon determination of plaintiff's status by the Commission. There is nothing

expressly to that effect in the Act, and we are at a loss to find anything that could be inferentially thus construed. The taxes are assessed under the express provisions of the statute by the Commissioner of Internal Revenue under his own regulations, and collected in like manner as other taxes are collected.

This is a personal suit against Appellee, and any judgment rendered herein would not be res judicata against the Secretary of the Treasury, the United States or the Commissioner of Internal Revenue (Sage v. United States, 250 U. S. 33; United States v. Stone & Donner Co., 274 U. S. 225; Bankers Pocahontas Coal Co. v. Burnett, 287 U. S. 308; Tait v. Western Maryland Railway Co., 289 U. S. 620). In the case of Bankers Pocahontas Coal Company **v. Burnett, supra,** it was contended that a **judgment** in the District Court for Northern West Virginia against the Collector of Internal Revenue was res judicata in a suit against the Commissioner of Internal Revenue, and the Court said:

> "With respect to this contention it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not res judicata against the Commissioner or the United States."

The later case of Tait v. Western Maryland Railway Co., supra, at page 637, approved the rule laid down in the above cause and made the following comment:

> "We think, however, that where question has been **adjudged as** between a taxpayer and the government or its official agent, the Commissioner, the Collector being an **official inferior in authority,**[1] **and acting under them,** is in such privity with them that he is estopped by the judgment."

[1] This and all other emphasis in the brief are ours.

Certainly there can be no privity found between the Appellee herein, charged with the gathering of the taxes, and an administrative board in a separate and independent department of the government, charged with the regulation of Code members producing bituminous coal.

Subject Matter Not the Same.

Section 4 of the Act limits the regulatory powers of the National Bituminous Coal Commission and its successor as follows:

> "Producers accepting membership in the Code as provided in section 5 (a) shall be, and are herein referred to as, Code Members, and the provisions of such Code shall apply **only to such Code Members,** except as otherwise provided by subsection (h) of part 2 of this section."

The exception contained in the above clause is inapplicable to the present case. The jurisdiction of the Board as to regulation of the bituminous coal industry, therefore, depends upon two things: First, the coal must be bituminous coal, and, second, the coal must be produced by a producer who has accepted membership in the Code. It is to be remembered that the Appellant herein is a non-code member and, therefore, by the express terms of the statute, not subject to the regulatory powers of the Commission. It is also to be remembered that the taxes under the terms of the Act are levied and collected by the Commissioner of Internal Revenue under his own regulations, subject to the approval of the Secretary of the Treasury. No question of Appellant's liability for taxes was either involved or decided in the proceedings set up in Appellee's answer, and we think no such question could have been involved or decided in these proceedings. (See Larison v. North End Transportation Co., 292 U. S. 20.) If decision had been otherwise

it would not have been binding on the Commissioner of Internal Revenue.

Bituminous Coal Commission Was Without Power to Hold Hearing and Make Determination of What Is or Is Not Bituminous Coal Within the Meaning of the Bituminous Coal Act of 1937.

The Commission acquired only such powers as might be either directly or inferentially conferred upon it by the Act. No express power being delegated by the Act, Appellee relies upon two provisions of the Bituminous Coal Act of 1937 as conferring jurisdiction upon the Commission. The first of such provisions is in section 2(a) of the Act and reads as follows:

> "Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act, and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress."

And a further provision in the same section, as follows:

> "No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence, shall be conclusive upon review thereof by any court of the United States."

The second of such provisions is found on section 4-A of the Act and reads as follows:

> "Any producer believing that any commerce in coal is not subject to the provisions of section 4 or of the provisions of the first paragraph of this section, may

file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which claim is based."

It is interesting to note that the asserted power under the latter clause was not discovered until after the power of the Commission was questioned. With reference to the first of these provisions:

The National Bituminous Coal Commission in its Order No. 28 (R. 2, p. 1) expressly stated that under its power to make and promulgate reasonable rules and regulations it was providing a method whereby producers of coal might secure a determination of their status under the Bituminous Coal Act of 1937. Appellant herein, without accepting the Code, and in conformity with said Order, filed a petition for exemption on the ground that its coal was not bituminous coal. Commission by its Order No. 53 (R. 2, p. 5) fixed a public hearing for the purpose of determining whether or not certain coals in the State of Arkansas were subject to the provisions of the Bituminous Coal Act of 1937, and to hear and determine at the same time all Arkansas applications for exemption, and on the 31st day of August, 1938, after hearing, entered what is designated "An order overruling plaintiff's petition for exemption" (R. 2, pp. 67-68). It is apparent that Order No. 28 was not in the nature of a regulation for the purpose of filling in any of the details of a power granted the Commission or its successor by the terms of the Act. The effect of the so-called regulation was to extend the power of the Commission to a special, specific inquiry and conclusive determination of the object to which the provissions of the act itself are to be applied. The general grant to adopt rules and regulations has never before been thus broadly construed, and the power of the Commission or its successor cannot be thus broadly extended (International Railway Co. v. Davidson, 257 U. S. 506; Man-

hattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U. S. 129; Koshland v. Helvering, 298 U. S. 441; United States v. Idaho, 298 U. S. 105). It is well settled by this Court that if the Act did not grant authority asserted by the Board, the filing of the ex parte petition by the Appellant would not confer jurisdiction (McNutt et al. v. General Motors Acceptance Corporation, 298 U. S. 178; United States v. Corrick, 298 U. S. 435).

The other source of alleged power of the Commission, the power to exempt, is contained in the same section, with a specific grant to hold hearings and determine the effect of the sale of bituminous coal in intrastate commerce on interstate commerce, and this power of exemption is confined to exempting from the provisions of section 4 (the Code) or the provisions of the first paragraph of section 4-A. This section fixes no standard to be followed by the Commission in the granting of exemptions. If this be construed as a general power to exempt without limitation, wholly at their own discretion, then this would clearly be an invalid delegation of legislative power (Panama Refining Co. v. Ryan, 293 U. S. 388; Schechter v. United States, 295 U. S. 495; Holgate Bros. Co. v. Bashore, ... Pa. ..., 200 Atl. 672).

It would be rather absurd to construe the Act as giving to the Commission power to except from the provisions of the Code coal that did not come within the provisions of the Code. The law itself makes this exception.

It is the contention of the Appellant that the construction and interpretation of the Act is ultimately for the Court. The purpose of the Court in construing the Act is to arrive at the intent of Congress, but this intent must be gathered from the words in the Act itself. In arriving at intent, the Court has a right to take into consideration certain helpful rules of construction, and Congress is assumed to have known these rules and legislated with

that knowledge. In the Act under consideration, Congress defines coal as "bituminous, semibituminous and subbituminous coal." Obviously, there is an ambiguity, even in the definition. The inquiry by this Court is to the intent of Congress in the use of those words. To determine the meaning, the Court has a right to look to the letter of the statute, to the circumstances under which it was enacted, to other statutes, to the mischief to be remedied, and to matters of general knowledge, and any other source which, according to the rules of construction, might throw light on the intent of Congress. The Court should make this construction from the Act itself, if possible, and evidence is received by the Court solely for the purpose of assisting it in the discharge of its judicial functions. In Crowell v. Benson, 285 U. S. 22, this Court said:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This Court has held the owner to be entitled to 'A fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both the law and facts.'"

The unreasonable, excessive and confiscatory nature of the so-called tax of 19½ per cent of the sale price of coal is obvious, and would seem to be determinative of the right of the Appellant to have had a trial de novo in this case, even if this were a petition to review. (See, also, State Corporation of Kansas v. Wichita Gas Co., 290 U. S. 561; B. & O. Ry. Co. v. United States, 298 U. S. 349; United States Gas Public Service Co. v. Texas, 303 U. S. 123; South Chicago Coal & Dock Co. v. Bassett, 104 Fed. [2d]

522-525; Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287.)

If Statute Be Construed as Delegating Power to Determine the Object to Which Law Is to Be Applied, Without Fixing Standard, Statute Invalid as Unlawful Delegation of Legislative Power.

The Bituminous Coal Act of 1937 declares that regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; in section 17 (b) the Act defines the term "bituminous coal" in the following language:

> "The term 'bituminous coal' includes all bituminous, semi-bituminous and sub-bituminous coal, and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seventy-six hundred per pound and having a natural moisture content in place in the mine of thirty percentum or more."

The purpose of a definition is to clairfy. Congress did in this definition make certain as to the exemption of lignitic coal by fixing a definite standard of yardstick for the determination of what is or is not lignitic coal. Obviously, however, although definition could be certain, there is no certainty as to what Congress intended by the use of the term "bituminous, semi-bituminous and sub-bituminous coal." If the object to which the law is to be applied is so indefinite of meaning as to be incapable of ascertainment, then the law becomes invalid for uncertainty. The Supreme Court of Illinois in Vallat v. Radio Dial Co., 360 Ill. 407, lays down the following rule:

> "In order that a statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them. Such definiteness may be

produced by words which have a technical or other special meaning well enough known to permit compliance therewith, or words which have an established meaning at common law through decision; but if the duty is imposed by statute through the use of words which have not yet acquired definiteness or certainty, and which are so general and indefinite that they furnish no such guide, the statute must be declared to be invalid. When it leaves the legislature the law must be complete in all its terms, and it must be definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution. * * * If the statute leaves it to a ministerial officer to define the thing to which the statute is to be applied, and if the definition is not commonly known in the modes already pointed out, the Act becomes invalid, because it creates an unwarranted and void delegation of legislative power."

As construed by the lower court, the terms used in the Act have no established meaning at common law and no technical or other special meaning well enough known to permit definite application; no standard for determining what is or is not bituminous coal is fixed by the Act; the Commission apparently construes the Act to permit them to make determination, according to their own discretion, in each particular case; such a construction of the statute would clearly be a delegation of legislative power and render the statute invalid. Many statutes have been upheld by this court against the challenge of uncertainty, but in all of these cases a standard of some sort has been afforded by the law. (See Connally v. General Construction Co., 269 U. S. 385; Hygrade Provision Co., Inc., v. Sherman, 266 U. S. 497; Nash v. United States, 229 U. S. 373; International Harvester Co. of America v. Kentucky, 234 U. S. 216; United States v. Cohen Grocery Co., 255 U. S. 81; Buttfield v. Stranahan, 192 U. S. 470.)

If Statute Be Construed as Delegating Power to Exercise Judicial Function, Such Delegation Renders the Statute Invalid as an Unlawful Delegation of Judicial Power.

Construction of the Act as to the Meaning of "Bituminous, Semi-Bituminous and Sub-Bituminous" Is a Judicial Function and Cannot Be Delegated to an Administrative Tribunal.

That the construction of this Act is a judicial function can scarcely be denied. That the Commission construed the Act as delegating to them the judicial function of interpretation is undeniably indicated by the opinion filed by the Commission. In the course of that opinion the Commission uses the following language:

> "Apparently the provisions of the Act defining the coals intended to be regulated are not free from ambiguity and are, therefore, open to construction. When the meaning of terms used in a statute are ambiguous, or when doubt is cast upon them by a construction attempted to be placed upon them, it is permissible to resort to the legislative history of the law to ascertain the true intent of the legislature" (R. 2, p. 60).

And a little later in the same opinion they make a strictly judicial interpretation and construction of the Act in the following language:

> "It follows, therefore, that by the use of the term 'Semi-bituminous' in the Act, Congress intended to deal with super-bituminous coal, and we hold that semi-bituminous coal is super-bituminous coal, and that the term semi-bituminous and semi-anthracite, when applied in determining the rank of coals for the purposes of regulation under the Act are synonymous terms and must be considered one and the same" (R. 2, pp. 61-62).

These statements give form and color to the proceedings and the findings before the Commission. Obviously, they were engaged in the judicial construction and interpretation of the Act, and not in the finding of facts such as might be delegated to an administrative body. The findings and order are clearly based upon a construction of the Act to the effect that semi-bituminous is synonymous with semi-anthracite. Such a construction would clearly render the Act invalid as an illegal delegation of the judicial function. In Crowell v. Benson, 285 U. S. 22, this Court made the following statement:

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do de-

pend, upon the facts, and finality as to facts becomes in effect finality in law."

It would seem obvious that no power was delegated to the Commission to make conclusive determination as to what is or is not bituminous coal within the meaning of the Act. It would seem equally obvious that an attempt on the part of Congress to delegate such authority to the Commission would be invalid and void as an unlawful delegation of judicial power.

Evidence was offered and rejected by the Court that appellant's coal and other coals in the Spadra field have been sold and marketed for more than a quarter of a century as semi-anthracite coal. The Bureau of Mines and Geological Survey of the Department of the Interior have classified coal from the Spadra field as semi-anthracite from the time of its discovery. The Fuel Administrator in 1918 classified Spadra as anthracite coal, and the National Bituminous Coal Commission, under the Coal Act of 1935, classified similar coal as anthracite. We believe that the Court may take judicial knowledge of these facts. This creates the paradoxical situation of every government department classifying Appellant's coal as anthracite or semi-anthracite, save and except the National Bituminous Coal Commission.

Shields v. Utah Idaho Central Railroad Co., 305 U. S. 177;
Rochester Telephone Corporation v. United States of America and Federal Communications Commission, 307 U. S. 125.

Appellee has heretofore relied very strongly upon the above cases. Neither of these cases is analogous or controlling.

The Shields case was treated by this court as a review

of proceedings before the Interstate Commerce Commission. The authority to hear and determine was express. All of the parties affected by the order were parties to the proceedings and participated in the hearing. The finding and order subjected the railroad to the requirements of the Railway Labor Act, and the suit to enjoin was an attack upon the order, by virtue of which they were made subject to the requirements of the Railway Labor Act. The Rochester Telephone Company case, supra, was a statutory review of an order made by the Federal Communications Commission under express authority, and all of the parties affected by the order were present and participated in the proceedings before the administrative board. These cases can be no authority in a case such as the present case, wherein no express authority is delegated, and the parties alleged to be affected were not parties to the proceedings before administrative board, and the order entered does not in anywise affect the questions presented.

POINT 2.

Section 3 (a) of the Bituminous Coal Act of 1937 (Now Sec. 3520, Internal Revenue Code 1939, 53 Stat. 430, 26 U. S. C. A. 3520a) imposes a tax of one cent per ton "Upon the sale or other disposal of bituminous coal." This is apt language and undoubtedly imposes the tax upon the sale of all bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof. Section 3 (b) imposes an additional so-called tax of 19½ per centum of the sale price in the following language:

> "In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within

the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection."

The imposition of the tax is in plain English, and the tax is expressly imposed upon the sale or other disposal of bituminous coal when sold or otherwise disposed of by the producer thereof, "**which would be subject to the application of the conditions and provisions of the Code provided in section 4, or of the provisions of section 4-A.**" The object of the tax is clearly not the sale of all bituminous coal produced within the United States, but only the sale of such bituminous coal as would be subject to the application of the conditions and provisions of the Code provided for in section 4 or of the provisions of section 4-A. By the express provisions of section 4, application of the Code is limited to Code members in the following language:

"And the provisions of such Code shall apply only to such Code members."

In other words, the sale of coal produced by a noncode producer such as the Appellant is not subject to the application of the provisions of the Code, and, therefore, not

subject to the tax under this provision of section 3 (b). It is worthy of note that the language in section 4 of the Act is that the Code "Shall apply only to such Code members," and in the taxing section of the Act the language is "subject to the application" of the Code.

It is also instructive to note that section 3 of the Bituminous Coal Conservation Act of 1935, c. 824, 49 Stat. 991, imposed the so-called tax on "the sale or other disposal of all bituminous coal." In re-enacting the Act Congress evidently intended to change the method of taxation in the Bituminous Coal Act of 1937. Substantially the same language as that used in the 1935 Act is employed in imposing the one cent per ton tax under section 3 (a) of the Act under consideration, but entirely different language is used in the imposition of the so-called tax of 19½ per centum of the sale price. This would clearly indicate an intent to change the object of the imposition of the tax [1]

The first section of section 4-A reads as follows:

> "Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4."

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[1] Cf. United States v. McClure, 305 U. S. 472.

Certainly nothing in this section would even suggest that the coal produced by Appellant was subject to the application of the conditions and provisions therein contained. This section merely gives express power to the Commission or its successor to declare, after hearing, that bituminous coal produced and sold in intrastate commerce directly affects interstate commerce, and will be subject to the regulatory powers of the Commission or its successor if and when they accept the Code.

The object of the tax being designated in unambiguous language, it would seem that no construction was necessary, nothing left to the court but to apply the law as written. The District Court in its Conclusion of Law No. 5 (R. 1, p. 49) held that section 3 (b) imposes a tax upon noncode producers of bituminous coal. The basis for this conclusion is not clear and is rather difficult to ascertain. True, the second section of the Act does exempt Code members from the imposition of this tax if they are certified as Code members to the Commissioner of Internal Revenue by the Commission, but this does not change the meaning of the words used by Congress in the imposition of the tax. Clearly, the Court construes this subsection as imposing a tax on the sale of all bituminous coal produced within the United States except coal produced by a Code member. To say that would involve not a construction of the Act but a rewriting of it.[2] Assuming, arguendo, that this was the intent and that a mistake had been made in the choice of language used, it is not within the province of the courts to rewrite the Act for the purpose of correcting mistakes or supplying omissions. That is a legislative function. As was well said by this court in Crooks v. Harrelson, 282 U. S. 55, at page 60, in construing the federal succession tax law:

"Courts have sometimes exercised a high degree of

[2] State Board of Equalization v. Young's Market, 299 U. S. 59.

ingenuity in the effort to find justification for wrenching from the words of the statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. * * * It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts."

Cf. Wallace v. Cutten, 298 U. S. 229;
Iselin v. United States, 270 U. S. 245;
Palmer v. Massachusetts, 308 U. S. 79.

It would seem obvious that the District Court in adopting such construction of the law was clearly in error.

POINT 3.

The Division of a Natural Class, Bituminous Coal, Into Artificial Classes of Code and Non-Code for Regulatory Purposes Is Unreasonable, Arbitrary, Discriminatory and Capricious, and Therefore Illegal and in Violation of the Fifth Amendment of the Constitution of the United States.

The scheme of classification for regulatory purposes in the Bituminous Coal Act of 1937, is, to say the least, unique. The Act takes a natural class,[1] bituminous coal,

[1] Heisler v. Thomas Collieries Co., 260 U. S. 245.

and divides it into two artificial classes, code and non-code. The regulatory provisions of the act are then expressly made applicable to code members only. The declared purpose of the Bituminous Coal Act of 1937 is to regulate the sale and distribution in interstate commerce of bituminous coal, and it seems to be generally agreed that the purpose of the Act was to stabilize the bituminous coal industry. This court has repeatedly held that classification, in order to be valid, must be based on proper and justifiable distinctions, considering the purpose of the law,[2] and must not be unreasonable, arbitrary or capricious, and the means selected must have a real and substantial relation to the object sought to be obtained.[3] It is very clear from the provisions of section 5 (a) of the Act that membership in the code is, at least ostensibly, voluntary; there is no provision in the regulatory sections of the Act requiring a producer to accept the code, nor is there any provision in any wise prohibiting or limiting the production and sale in interstate commerce of bituminous coal by either code or non-code members. The Act nowhere in its provisions purports to regulate all bituminous coal produced and sold in interstate commerce. It would seem clear that the regulation of a part or tion only of the bituminous coal produced and sold in interstate commerce in the United States would have no real and substantial relation to the stabilization of the bituminous coal industry. If evils exist which require regulation of the bituminous coal produced and sold in interstate commerce, then, in order to remedy the existing evils, all bituminous coal produced and sold in interstate commerce should be regulated.

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2 L. & N. Railroad Co. v. Melton, 218 U. S. 36.
New York Rapid Transit Corp. v. New York, 303 U. S. 573.

3 Nebbia v. New York, 291 U. S. 502-525.

The So-Called 19½ Per Cent Tax on the Sale Price of Coal Is Obviously Not a Tax, But a Confiscatory Penalty Assessed Without Fault on the Part of the Appellant. Exemption From Such So-Called Tax Is Based Not Upon Difference in Their Conduct or Product, But Solely Upon Membership in the Code. Such Classification for Exemption Purposes Is Clearly Unreasonable, Arbitrary, Discriminatory and Capricious, and Not in Any Wise a Proper Method of Accomplishing a Proper Congressional Practice, and Violates the Fifth Amendment of the Constitution of the United States. Membership or Nonmembership in an Organization Certainly Cannot Be a Proper Basis for Classification Either for Regulation or Taxation Purposes.

Trial Court held that the so-called excise tax of 19½ per cent of the sale price was a valid exaction from Appellant, since the regulatory provisions of the Act are valid. Thus construed, the so-called excise tax is clearly not a true tax levied under the taxing power of Congress delegated by Article I, section 8, clause 1, of the Constitution of the United States. This Court in the case of Carter v. Carter Coal Company, 298 U. S. 238, at page 289, speaking of a similar excise tax levied by the Bituminous Coal Conservation Act of 1935, said:

> "It is very clear that the 'excise tax' is not imposed for revenue; but exacted as a penalty to compel compliance with the regulatory provisions of the Act. The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail."

It seems that this is determinative of the nature of the so-called excise tax.

The exaction cannot be sustained as a penalty. The word "penalty" carries with it the idea of punishment. Punishment without fault would be contrary to natural justice.[1] It may be conceded that Congress has a wide discretion in the imposition of penalties for the violation of its rules, but in order to sustain a penalty there must be some violation of some rule or law. Appellant, it is true, has not accepted the Code, but Congress did not see fit to make the acceptance of the Code obligatory. Nothing contained in the regulatory provisions of the Act would indicate any intention on the part of Congress to in any manner penalize a producer for not accepting the provisions of the code. Ostensibly, at least, membership in the Code is purely voluntary [Section 5 (a)]. Appellant is engaged in the pursuit of a lawful business, has not violated any rule or law, or regulation of Congress. Courts are concerned with the enforcement of legal rights, not moral obligations.

Section 3 (b) of the Act of 1937 imposing the so-called tax of 19½ per cent of the sale price is substantially different from the taxing section of the 1935 Coal Act. Exemption from the so-called excise tax under the 1935 Act was based upon membership in the Code **and compliance with the provisions of such Code.** Exemption under the 1937 Act is based solely upon membership in the Code. This latter classification is clearly unreasonable, arbitrary, capricious and discriminatory. It is rather difficult to conceive how membership, and membership alone, could have any real and substantial relation to the object sought to be attained. Membership in the Code is not the equivalent of a compliance with the regulations. A producer who has accepted the Code, so long as he is a Code member, may violate all minimum and maximum prices and rules and regulations fixed by the Commission and still be im-

[1] Arizona Copper Co. v. Hammer, 250 U. S. 400.

mune from the exaction of any penalty. He may, in time, be expelled from the Code or ordered to cease and desist, as provided in section 5 (b) of the Act, but no penalty attaches by reason of his violation of the prices, rules or regulations. After expulsion he may continue to produce and sell bituminous coal in interstate commerce. He may quit the business. In the event that he desires to be reinstated as a Code member he is subjected to a money payment before membership in the Code is restored. The arbitrary and unreasonable nature of this attempted classification is strikingly illustrated by the present case. While minimum prices were in effect for a short time from December 9, 1937, to February 25, 1938, at all other times since this Act went into effect Appellant and all other producers of coal of any kind or character whatsoever have produced and sold their coal under the same conditions and in an open market in free and open competition one with the other. No minimum or maximum prices, no marketing rules or regulations have been in effect as to either code members or noncode members, and yet, solely because Appellant has not accepted the Code, Appellee is attempting to subject the Appellant to this so-called excise tax of 19½ per cent of the sale price of coal.

The discriminatory nature of such a classification is easily demonstrated. Noncode member may be willing to and may comply with all of the requirements of the Code as to minimum and maximum prices, marketing rules and trade practices, and yet, solely because of his nonmembership in the Code, be subjected to the so-called tax of 19½ per cent. Certainly this is neither reasonable nor permissible classification. Appellee will doubtless contend that this so-called excise tax is a part of the regulatory scheme intended to be sufficiently burdensome to necessitate all producers joining the Code. Whatever the intent may be, it must be conceded that such has not been the effect of the so-called excise tax.

Congress Has No Power to Fix Minimum Prices for Bituminous Coal Sold in Interstate Commerce.

The power to fix prices of bituminous coal in interstate commerce is based upon the grant of power to regulate commerce among the several states. This court heretofore, on numerous occasions,[1] has considered very similar questions, and, whatever may have been the rule prior to March 5, 1934, this Court on that date, in the case of Nebbia v. New York, 291 U. S. 502, at page 536, laid down the present governing rule in the following language:

> "It is clear that there is no closed class or category of business affected with the public interest, and the functions of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. * * * The phrase 'Affected with the public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court, wherein the expressions 'Affected with the public interest' and 'clothed with public use' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the product or commodities it sells."

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1 See dissenting opinion, Nebbia v. New York, 291 U. S. 502.

In the Nebbia case, supra, the question involved was the power of the State to fix milk prices. This Court, in the case of United States v. Rock Royal Cooperative, 307 U. S. 533 (decided June 5, 1939), held that "Authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." It would seem clear that there is no doubt as to the propriety of this court inquiring into whether or not the occasion was proper and the measures appropriate. The present inquiry is whether or not the Bituminous Coal Act is a reasonable exertion of governmental authority and whether or not it is arbitrary or discriminatory. The cases of Nebbia v. New York and United States v. Rock Royal Cooperative, supra, both involve the question of fixing milk prices in the State of New York, and it is clear, from a reading of these cases, that the price control features of the Act were sustained upon the theory that the use and nature of milk was such as to create an interest of the public in the source and the continuity of an uncontaminated supply of a necessary article of food sufficient to justify its regulation for the public good. Coal is entirely unlike milk, both in its nature and its use. Nature created the source of supply and its existence does not depend upon any activity of man. Its nature and use is such that it could in nowise endanger the health or morals of the populace. Various states have enacted legislation to promote safety in the mining of coal, but this legislation is directed at the manner of production and not because of any danger inherent in the product. No question of conservation is here involved, as the court in its findings of fact made no finding that this natural resource is being wasted. As a matter of fact, the Court specifically refused to make a finding that "The operators wasted the best of the nation's coal reserve because they were cheap and readily

available" (Statement as to jurisdiction, page 56). The Court found in its findings of fact that "Due largely to over-expansion of the industry during the world war, to competition from other fuels and to increased efficiency in the use of fuel, the amount of soft coal consumed has markedly declined (R. 1, pp. 47-48). (See also United States v. Appalachian Coals, Inc., 288 U. S. 344, 53 Sup. Ct. 471.)

In the case of City of Atlanta v. National Bituminous Coal Commission, 26 Fed. Supp., page 606 (decided February 16, 1939, by the District Court of the United States for the District of Columbia), the Court took occasion to make the following remark:

> "The soft coal industry supplies the nation with its primary source of energy, vitally essential to the existence of the country's industries, and to the health and comfort of its inhabitants. Conditions in the marketing of coal have long been more or less chaotic, with the result that the flow of commerce in coal has been seriously burdened and impaired. It was to eradicate this evil, and to prevent its recurrence, that Congress acted thus to protect interstate commerce."

Clearly the ills of the coal industry are directly attributable to overproduction. Consumption is annual being lessened by improved methods of burning and by competition with other sources of energy. It is a matter of common knowledge that coal has maintained its ascendency as a source of energy largely by reason of its economy. It is also commonly known that the result of the present fixing of prices in the bituminous coal industry will lead to a substantial increase in the cost of coal to practically every consumer of bituminous coal. The natural and logical result of narrowing the differential between bituminous coal and competing sources of energy can but be the further loss of markets, with a corresponding further reduc-

tion in the consumer demand and a corresponding increase in the afflictions which beset the industry by reason of this overproduction. It can scarcely be contended that an increase in the price of bituminous coal would in anywise encourage an increased consumption, stop the encroachment of other sources of energy upon the coal markets, nor prevent labor disturbances. The most that is claimed for the Act by its administrators is that it will save the coal industry from bankruptcy and give an opportunity to producers and miners alike to avoid poverty and to wear shoes on their feet. Whatever may have been the purpose of the Act, it stands revealed that the effect of the Act is to permit those operators who belong to the Code to combine and increase the cost of bituminous coal to the consuming public without the wholesome restriction of the Anti-trust laws of the United States [April 26, 1937, c. 127, sec. 4, part 1, 50 Stat. 76, 15 U. S. C. A. 832 (d), Bituminous Coal Act, section 4 (d)]. This can hardly be considsidered a regulation of commerce within the power of Congress to foster, protect and encourage. If reasonableness can be found under these circumstances, it can be found almost anywhere. If financial difficulties of part of the industry, keen and active competition, labor troubles, be considered proper circumstances sufficient to justify regulation of industry by Congress, then, indeed, have the experiences of the last few years furnished a background for the federal regulation of practically every industrial activity within the United States. Surely it was not the intention of the framers of the Constitution to delegate to Congress the power to regulate all industry to the end that everybody engaged in industrial activity might be protected from financial difficulties, open competition, and be assured that their business might be operated at a profit.

It is undoubtedly the general rule that property rights and contract rights shall be free from governmental inter-

ference. It is very clear that the so-called 19½ per cent tax has no connection with the revenues of the government, but that its sole purpose is to coerce producers into acceptance of the Code. This Congress cannot do (Charles C. Steward Machine Co. v. Davis, 301 U. S. 548; Carmichael v. Southern Coal & Coke Co., 301 U. S. 495).

If the Act be construed as the lower court has construed it, it is violative of the due-process-of-law clause of the Fifth Amendment and in violation of the inherent rights of the citizen. Briefly, the method of regulation is to set up an artificial entity designated as "The Code," provide for voluntary membership in the Code, and regulate those producers who accept the Code, and coerce, by means of the 19½ per cent tax, other producers of the same class, who do not accept the Code, into either joining the Code or quitting business. Coercion and intimidation are not permitted by the courts as between private citizens; much less should it be permitted as between the government and its citizens. What has heretofore been said as to the arbitrary and discriminatory nature of the various provisions of the Act is applicable here. If Congress should have the power to regulate the bituminous coal industry, this end must be attained by laws not violative of the Fifth Amendment. Regulation, to be effective, must regulate all of the class, and it is very clear that this is not done in the Bituminous Coal Act of 1937. The Bituminous Coal Act of 1937, therefore, is clearly beyond the power of Congress for the reason that it is not reasonable governmental regulation designed to foster, protect or encourage interstate commerce, and is arbitrary and discriminatory.

Mulford v. Smith, 307 U. S. 38.

Undoubtedly, Appellee will rely on the above case as determinative of the questions here presented. This case

presented constitutional questions with reference to the Agricultural Adjustment Act in its application to Flue-Cured Tobacco. There are fundamental differences between the Agricultural Adjustment Act and the Bituminous Coal Act of 1937 both in their method of regulation and the administrative provisions. Congress in the enactment of the Agricultural Adjustment Act of 1938 found that the marketing of tobacco was a basic industry which directly affects interstate and foreign commerce; that stable conditions in such marketing are necessary to the general welfare; that tobacco is sold on a national market and it and its products move almost wholly in interstate and foreign commerce; that without federal assistance the farmers are unable to bring about orderly marketing, with a consequence that abnormally excessive supplies are produced and dumped indiscriminately on the national market; that this disorderly marketing of excess supply burdens and obstructs interstate and foreign commerce, causes reduction in prices and consequent injury to commerce, creates disparity between the prices of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce, and diminishes the volume of interstate commerce in industrial products, and that the establishment of quotas as provided by the Act is necessary and appropriate to promote, foster and obtain an orderly flow of tobacco in interstate and foreign commerce. Congress thus recognizes that the ills of the tobacco industry are attributable to overproduction, and attacks the evil by a method reasonably designed, if not to curtail production, to diminish the supply that moves on the interstate and foreign market. It does not fix prices, but fixes quotas which the producer may sell through the available marketing agencies, and penalizes those who exceed their marketing quotas. After regulation has been adopted by vote, regulation is applicable to all producers of flue-cured tobacco. Here we have a regu-

lation of all of the class without discrimination; the control of the sales by the authoritative fixing of marketing quotas; a penalty for a violation of the marketing quota, which is a far different method of regulation from that prescribed by the Bituminous Coal Act of 1937. The Bituminous Coal Act of 1937 does not purport to regulate all of the class of bituminous coal, but only that part of the class who have accepted the code. It does not purport to control or curtail the sales of bituminous coal in interstate commerce; permits all the coal produced by code and non-code members to be sold in interstate commerce; fixes minimum prices and marketing rules and regulations for code members and code members only; does not prohibit the production and sale of bituminous coal in interstate commerce by non-code producers; and, as construed by the court below, attempts to place a so-called tax of 19½ per cent of the sale price upon that part of the bituminous coal sold in interstate commerce by the non-code producer. This presents an entirely different situation and different questions from those presented in the case of Mulford v. Smith, supra. The cases are in no wise analogous.

Right to Equitable Relief.

Findings of the Court disclose that Appellant's property had been operated at a loss for the past three years; that the total sale value of defendant's property would not exceed $30,000.00; that Appellant could not borrow money (R. 1, p. 45); the burdensome and confiscatory nature of the 19½ per cent tax is obvious; the inability of Appellant to pay the tax is equally obvious. If Appellant was required to pay this exorbitant and excessive so-called excise tax the resultant confiscation of its property is very clear; the good faith and diligent prosecution of its claim is apparent, and was declared in the Court's opinion (Jurisdictional statement, page 58). The facts bring Appellant

clearly within the doctrine of this court laid down in Ex parte Young, 209 U. S. 123, and equitable protection of Appellant should be extended by this Court until the final termination of this litigation (Natural Gas Pipe Line Co. v. Slattery, 302 U. S. 300; Carter v. Carter Coal Co., 298 U. S. 238 [dissenting opinion, Cardozo, J.]. See, also, Miller v. Standard Nut Margarine Co., 284 U. S. 498; Hill v. Wallace, 259 U. S. 44-62).

CONCLUSION.

It is respectfully submitted that so much of the decree herein as dismisses the complaint of Appellant be reversed and cause remanded to the court below with directions to grant relief as prayed in the complaint, or for further proceedings herein.

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APPENDIX.

[Public—No. 48—75th Congress]

[Chapter 127—1st Session]

[H. R. 4985]

An Act

To Regulate Interstate Commerce in Bituminous Coal, and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom.

National Bituminous Coal Commission

Sec. 2. (a) There is hereby established in the Department of the Interior a National Bituminous Coal Commission (herein referred to as Commission), which shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The Commission shall annually designate its chairman, and shall have a seal which shall be judicially recognized. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. The Commission shall have an office in the city

of Washington, District of Columbia, and shall convene at such times and places as the majority of the Commission shall determine. Two members of the Commission shall have been experienced bituminous coal mine workers, two shall have had previous experience as producers, but none of the members shall have any financial interest, direct or indirect, in the mining, transportation, or sale of, or manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydro-electric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. Not more than one commissioner shall be a resident of any one State, and not more than one commissioner shall be a resident of any one of the districts hereinafter established, but a change in any of the boundaries of the districts, made by the Commission as hereinafter provided, shall not affect the tenure of office of any commissioner then serving. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. The Commission is authorized to appoint and fix the compensation and duties of a secretary and necessary professional, clerical, and other assistants. With the exception of the secretary, a clerk to each commissioner, the attorneys, the managers and employees of the statistical bureaus hereinafter provided for, and such special agents, technical experts, and examiners as the Commission may require, all employees of the Commission shall be appointed and their compensation fixed in accordance with the provisions of the civil-service laws and the Classification Act of 1923, as amended. No person appointed without regard to the provisions of the civil-service laws shall be related to any member of the Commission by marriage or within the third degree by blood. The Commission is authorized to accept and utilize voluntary and uncompensated services of any person or of

any official of a State or political subdivision thereof. The members of the Commission shall each receive compensation at the rate of $10,000 per year and necessary traveling expenses. Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress. A majority of the Commission shall constitute a quorum for the transaction of business, and a vacancy in the Commission shall not impair the right of the remaining members to exercise all the power of the Commission. No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States. The Commission may establish divisions, each of which divisions shall consist of not less than three of its members, as it may deem necessary for the proper dispatch of its business. Each such division shall exercise all the powers and authority of the Commission in the premises: Provided, That any person in interest may, upon written petition, secure a review by the Commission of the report, finding, or order of such division. The Commission may by its order assign or refer any matter within its jurisdiction under this Act to an individual Commissioner, to a board composed of employees of the Commission, or to an examiner, to be designated by such order, for hearing and the recommendation of an appropriate order in the premises. Each individual Commissioner, board, or examiner, when so directed by order of the Commission, shall have power to administer

oaths and affirmations, to examine witnesses, and receive evidence. The Commission is authorized to make contracts for personal services in the District of Columbia and elsewhere and to establish and maintain such offices throughout the United States as it deems necessary for the effective administration of this Act, but shall maintain its principal office in the District of Columbia.

The Commission is hereby authorized to initiate, promote, and conduct research designed to improve standards and methods used in the mining, preparation, conservation, distribution, and utilization of coal and the discovery of additional uses for coal, and for such purposes shall have authority to assist educational, governmental, and other research institutions in conducting research in coal, and to do such other acts and things as it deems necessary and proper to promote the use of coal and its derivatives.

(b) (1) There is hereby established an office in the Department of the Interior to be known as the office of the consumers' counsel of the National Bituminous Coal Commission. The office shall be in charge of a counsel to be appointed by the President, by and with the advice and consent of the Senate. The counsel shall have no financial interest, direct or indirect, in the mining, transportation, or sale of, or the manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. The counsel shall receive compensation, at the rate of $10,000 per year and necessary traveling expenses.

(2) It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters relative to the coal industry and the

administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission. In any such proceeding before the Commission, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpena or other process of the Commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the Commission furnish any information at its command or conduct any investigation as to any matter within its authority, the counsel shall so certify to the Commission, specifying in the certificate the information or investigation desired. Thereupon the Commission shall promptly furnish to the counsel the information or promptly conduct the investigation and place the results thereof at the disposal of the counsel.

(3) The counsel is authorized to appoint and fix the compensation and duties of necessary professional, clerical, and other assistants. With the exception of a clerk to the counsel, the attorneys, and such special agents and experts as the counsel may from time to time find necessary for the conduct of his work, all employees of the counsel shall be appointed and their compensation fixed in accordance with the civil-service laws and the Classification Act of 1923, as amended. The counsel is authorized to make such expenditures as may be necessary for the performance of the duties vested in him.

(4) The counsel shall annually make a full report of the activities of his office directly to the Congress.

Tax on Coal

Sec. 3. (a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United

States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of two thousand pounds.

The term "disposal" as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.

(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

(c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(d) In the case of coal disposed of otherwise than by sale

at the mine, and coal sold otherwise than through an arms' length transaction, the Commissioner of Internal Revenue shall determine the market value thereof. Such market value shall equal the current market price at the mine of coal of a comparable kind, quality, and size produced for market in the locality where the coal so disposed of is produced.

(e) The tax imposed by subsection (a) of this section shall not apply in the case of a sale of coal for the exclusive use of the United States or of any State or Territory of the United States or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions. Under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, a credit against the tax imposed by subsection (a) of this section or a refund may be allowed or made to any producer of coal in the amount of such tax paid with respect to the sale of coal to any vendee, if the producer has in his possession such evidence as the regulations may prescribe that such coal was resold by any person for the exclusive use of the United States or of any State, Territory of the United States, or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions.

(f) No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

Bituminous Coal Code

Sec. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code", and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

Part I—Organization

(a) Twenty-three district boards of code members shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined by the majority vote of the district tonnage during the calendar year 1936 represented at a meeting of the code members of the district called for the purpose of such determination and for the election of such district board; and all code members within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be code members or representatives of code members truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by the majority in number of the code members of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in

the proportion of the annual tonnage output of the code members in the district, for the calendar year preceding the date of the election: Provided, That not more than one officer or employee of any code member within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected. The Commission shall have power to remove any member of any district board upon its finding, after due notice and hearing, that said member is guilty of inefficiency, willful neglect of duty, or malfeasance in office.

The district boards shall have power to adopt bylaws and rules of procedure, subject to approval of the Commission, and to appoint officers from within or without their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of the twenty-three districts are set forth in the schedule entitled "Schedule of Districts" and annexed to this Act.

Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that the territorial boundaries or limits of any district or minimum-price area are such as to make it substantially impracticable to establish minimum prices in accordance with all the standards set forth in subsections (a) and (b) of part II of this section, and that a change in such territorial boundaries or

limits or a division or consolidation of such districts or minimum-price areas would render the establishment of minimum prices in accordance with all such standards more practicable, it shall by order make such changes, divisions, and consolidations as it finds will substantially aid in such establishment of minimum prices.

(b) The expense of administering the code by the respective district boards shall be borne by the code members in the respective districts, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by such boards with the approval of the Commission. Such assessments may be collected by the district board by action in any court of competent jurisdiction.

(c) Nothing contained in this Act shall constitute the members of a district board partners for any purpose. Nor shall any member of a district board or officer thereof be liable in any manner to anyone for any act of any other member, officer, agent, or employee of the district board. Nor shall any member or officer of a district board, exercising reasonable diligence in the conduct of his duties under this Act, be liable to anyone for any action or omission to act under this Act except for his own willful misfeasance or for nonfeasance involving moral turpitude.

(d) No action complying with the provisions of this section taken while this Act is in effect or within sixty days thereafter, by any code member or by any district board, or officer thereof, shall be construed to be within the prohibitions of the antitrust laws of the United States.

Part II—Marketing

The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "minimum-price-area table", equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as de-

termined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

Minimum-Price-Area Table

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; that part of Southeastern district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12.

Area 3: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 4: Arkansas-Oklahoma, district 14.

Area 5: Southwestern, district 15.

Area 6: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 7: Wyoming, district 19; Utah, district 20.

Area 8: North Dakota and South Dakota, district 21.

Area 9: Montana, district 22.

Area 10: Washington and Alaska, district 23.

The minimum prices so proposed shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public. The procedure for proposal of minimum prices shall be in accord-

ance with rules and regulations to be approved by the Commission.

A schedule of such proposed minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify such proposed minimum prices to conform to the requirements of this subsection, which shall serve as the basis for the coordination provided for in the succeeding subsection (b): Provided, That all minimum prices proposed for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: And provided further, That no minimum price shall be proposed that permits dumping.

As soon as possible after its creation, each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be

taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, propose reasonable rules and regulations incidental to the sale and distribution, by code members within the district, of coal. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, for the purpose of coordination.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the

various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of part II of this section.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: Provided, That no maximum price shall be estab-

lished for any mine which shall not yield a fair return on the fair value of the property.

(d) If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act.

(e) No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: Provided, That the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act, until prices shall have been established pursuant to subsections

(a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

No contract shall be made for the sale of coal for delivery after the expiration date of this Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the island of Cuba. Bunker coal delivered to steamships for consumption thereon shall be regarded as shipped within the domestic market. Maximum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the continental United States.

(f) All data, reports, and other information in the possession of any agency of the United States in relation to coal shall be available to the Commission and to the office of the consumers' counsel for the administration of this Act.

(g) The price provisions of this Act shall not be evaded or violated by or through the use of docks or other storage facilities or transportation facilities, or by or through the use of subsidiaries, affiliated sales or transportation companies or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, of any transportation or incidental charge of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this subsection effective.

(h) The Commission shall, by order, prescribe due and reasonable maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as "distributors", who purchase coal for resale and resell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal, of the prices and marketing rules and regulations established under this section.

Unfair Methods of Competition

(i) The following practices with respect to coal shall be unfair methods of competition and shall constitute violations of the code:

1. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his agent: Provided, however, That coal which has not actually been sold may be forwarded, consigned to the producer or his agent at rail or track yards, tidewater ports, river ports, or lake ports, or docks beyond such ports, when for application to any of the following classes: Bunker coal, coal applicable against existing contracts, coal for storage (other than in railroad cars) by the producer or his agent in rail or track yards or on docks, wharves, or other yards for resale by the producer or his agent.

2. The adjustment of claims with purchasers of coal in such manner as to grant secret allowances, secret rebates, or secret concessions, or other price discrimination.

3. The prepayment of freight charges with intent to or having the effect of granting a discriminatory credit allowance.

4. The granting in any form of adjustments, allowances,

discounts, credits, or refunds to purchasers or sellers of coal, for the purposes or with the effect of altering retroactively a price previously agreed upon, in such manner as to create price discrimination.

5. The predating or postdating of any invoice or contract for the purchase or sale of coal, except to conform to a bona-fide agreement for the purchase or sale entered into on the predate.

6. The payment or allowance in any form or by any device of rebates, refunds, credits, or unearned discounts, or the extension to certain purchasers of services or privileges not extended to all purchasers under like terms and conditions, or under similar circumstances.

7. The attempt to purchase business, or to obtain information concerning a competitor's business by concession, gifts, or bribes.

8. The intentional misrepresentation of any analysis or of analyses, or of sizes, or the intentional making, causing, or permitting to be made, or publishing, of any false, untrue, misleading, or deceptive statement by way of advertising, invoicing, or otherwise concerning the size, quality, character, nature, preparation, or origin of any coal bought, sold, or consigned.

9. The unauthorized use, whether in written or oral form, of trade-marks, trade names, slogans, or advertising matter already adopted by a competitor, or any deceptive approximation thereof.

10. Inducing or attempting to induce, by means or device whatsoever, a breach of contract between a competitor and his customer during the term of such contract.

11. Splitting or dividing commissions, brokers' fees, or brokerage discounts, or otherwise in any manner directly or indirectly using brokerage commissions or jobbers' ar-

rangements or sales agencies for making discounts, allowances or rebates, or prices other than those determined under this Act, to any industrial consumer or to any retailers, or to others, whether of a like or different class.

12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they are[1] any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

13. Employing any person or appointing any sales agent, at a compensation obviously disproportionate to the ordinary value of the service or services rendered, and whose employment or appointment is made with the primary intention and purpose of securing preferment with a purchaser or purchasers of coal.

It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any bona-fide and legitimate farmers' cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to any such cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchasers in wholesale or middleman quantities.

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[1] So in original.

(j) The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in part II of this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

(k) In the investigation of any complaint or violation of the code, or of any rule or regulation the observance of which is required under the terms thereof, the Commission shall have power by order to require such reports from, and shall be given access to inspect the books and records of, code members to the extent deemed necessary for the purpose of determining the complaint. Any such order shall be subject to review as are other orders of the Commission.

(l) The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

Sec. 4-A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons

and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption

continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6.

Organization of the Code

Sec. 5 (a) Upon the appointment of the Commission it shall at once promulgate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptances, when executed, shall be acknowledged before any official authorized to take acknowledgments.

(b) The membership of any such coal producer in such code and his right to an exemption from the taxes imposed by section 3 (b) of this Act, may be revoked by the Commission upon written complaint by any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, after a hearing, with thirty days' written notice to the member, upon proof that such member has willfully violated any provision of the code or any regulation made thereunder; and in such a hearing any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, or any consumer or employee, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: Provided, That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and regulations made thereunder and upon failure of the code member to comply with such order the Commission may apply to a circuit court of appeals to enforce such order in accordance with the provisions of subsection (c) of section 6 or may reopen the case upon ten

days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code member and its findings of fact, if supported by substantial evidence, shall be conclusive upon any proceeding to review the action and order of the Commission in any court of the United States.

In making an order revoking membership in the code as in this subsection provided, the Commission shall specifically find (1) the day or days on which the violations occurred; (2) the quantity of coal sold or otherwise disposed of in violation of the code or regulations thereunder; (3) the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder; (4) the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal; (5) the amount of tax required to be paid by the code member as a condition to reinstatement to membership in the code as in subsection (c) hereof provided.

(c) Any producer whose membership in the code and whose right to an exemption from the tax imposed by section 3 (b) of this Act shall have been revoked and canceled may apply to the Commission and shall have the right to have his membership in the code restored upon payment by him to the United States of double the amount of the tax provided in section 3 (b) upon the sales price at the mine, or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or disposed of by the code member in violation of the

code or regulations thereunder (but in no case shall such sales price or market value be taken to be less than the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal), as found by the Commission under subsection (b) hereof. The Commission shall thereupon certify to the Commissioner of Internal Revenue and to the collector of internal revenue for the internal revenue collection district in which the producer resides the amount of the required payment as found under clause (5) of subsection (b), and upon payment of such amount to the Commissioner or the collector such officer shall notify the Commission thereof.

(d) Any code member who shall be injured in his business or property by any other code member by reason of the doing of any act which is forbidden or the failure to do any act which is required by this Act or by the code or any regulation made thereunder, may sue therefor in any court of competent jurisdiction where the defendant resides, or is found or has an agent or a place of business, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 6. (a) All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest, including any State or any political subdivision thereof. In the event that a district board shall fail, for any reason, to take action authorized or required by this Act, then the Commission may take such action in lieu of the district board. The Commission may

also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive.

(b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken,

and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(c) If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce

such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modily its findings as to the facts or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

Sec. 7. All provisions of law, including penalties and refunds, applicable in respect of the taxes imposed by Title IV of the Revenue Act of 1932, as amended, shall, insofar as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed under this Act.

Sec. 8. (a) The members of the Commission are authorized to administer oaths to witnesses appearing before the Commission and to authorize the taking of depositions in any proceedings; and, for the purpose of conducting its investigations, said Commission shall have full power to

issue subpenas and subpenas duces tecum, which shall be as nearly as may be in the form of subpenas issued by district courts of the United States. In case of contumacy by or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Upon the filing of the application for such aid with the clerk of the court the court shall, either in term time or vacation, forthwith enter an order of record, requiring such person to appear before such court at a time stated in the order not more than ten days from the entry of the order (unless for good cause shown such time is extended), and show cause why he should not be required to obey such subpena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission and give such testimony or produce such evidence as may be lawfully required by said Commission. The district court, either in term time or vacation, shall have full power to punish for contempt as in other cases of refusal to obey the process and order of such court. Witnesses summoned before the Commission or when depositions are taken upon order of the Commission, shall be paid the same fees and mileage as are paid witnesses in the courts of the United States, and officers taking such depositions shall be paid the same fees as are paid for like services in courts of the United States.

(b) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpena of the Commission

or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 9. (a) It is hereby declared to be the public policy of the United States that—

(1) Employees of producers of coal shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers.

(2) No producer shall interfere with, restrain, or coerce employees in the exercise of their said rights, nor discharge or discriminate against any employee for the exercise of such rights.

(3) No employee of any producer and no one seeking employment with him or it shall be required as a condition of employment to join any association of employees for collective bargaining in the management of which the producer has any share of direction or control.

(b) No coal (except coal with respect to which no bid is required by law prior to purchase thereof) shall be purchased by the United States, or by any department or

agency thereof, produced at any mine where the producer failed at the time of the production of such coal to accord to his or its employees the rights set forth in subsection (a) of this section.

(c) On the complaint of any employee of a producer of coal, or other interested party, the Commission may hold a hearing to determine whether any producer supplying coal for the use of the United States or any agency thereof, is complying with the provisions of subsection (a) of this section. If the Commission shall find that such producer is not complying with such provisions, it shall certify its findings to the department or agency concerned. Such department or agency shall thereupon declare the contract for the supply of the coal of such producer to be canceled and terminated.

(d) Nothing contained in this Act or section shall be construed to repeal or modify the provisions of the Act of March 23, 1932 (ch. 90, 47 Stat. 70), or of the Act of July 5, 1935 (ch. 372, 49 Stat. 449), known as the National Labor Relations Act, or of any other Act of Congress regarding labor relations or rights of employees to organize or bargain collectively, or of the Act of June 30, 1936 (ch. 881, 49 Stat. 2036).

Sec. 10. (a) The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Com-

mission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission.

(b) Any officer or employee of the Commission or of any district board who shall, in violation of the provisions of subsection (a), make public any information obtained by the Commission or the district board, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $500, or by imprisonment not exceeding six months, or by both fine and imprisonment, in the discretion of the court.

(c) If any producer required by this Act or the code or regulation made thereunder to file a report shall fail to do so within the time fixed for filing the same, and such failure shall continue for fifteen days after notice of such default, the producer shall forfeit to the United States the sum of $50 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the producer has his principal office or in any district in which he shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeiture.

Sec. 11. State laws regulating the mining of coal not inconsistent herewith are not affected by this Act.

Sec. 12. Any combination between producers creating a marketing agency for the disposal of competitive coals in interstate commerce or in intrastate commerce directly affecting interstate commerce in coal at prices to be de-

termined by such agency, or by the agreement of the producers operating through such agency, shall, after promulgation of the code provided for in section 4, be unlawful as a restraint of interstate trade and commerce within the provisions of the Act of Congress of July 2, 1890, known as the Sherman Act, and Acts amendatory and supplemental thereto, unless such producers have accepted the code provided for in section 4 and shall comply with its provisions.

Subject to the approval of the Commission, a marketing agency may, as to its members, or such marketing agencies may, as between and among themselves, provide for the cooperative marketing of their coal, at prices not below the effective minimum prices nor above the effective maximum prices prescribed in accordance with section 4: Provided, That no such approval shall be granted by the Commission unless it shall find that the agreement under which such agency or agencies propose to function (1) will not unreasonably restrict the supply of coal in interstate commerce, (2) will not prevent the public from receiving coal at fair and reasonable prices, (3) will not operate against the public interest, and (4) that each such agency and its members have agreed to observe the effective marketing regulations and minimum and maximum prices from time to time established by the Commission and otherwise to conduct the business and operations of the agency in conformity with reasonable regulations for the protection of the public interest, to be prescribed by the Commission.

The Commission may, by order, upon complaint of any code member, district board, or member thereof, any State or political subdivision thereof, the consumers' counsel or any other interested person, or on its own motion, suspend or revoke its prior approval of any such marketing agency agreement upon finding that the regulations and orders

of the Commission or the requirements of this section have been violated. Unless and until the approval of the Commission is suspended or revoked, neither the agreement creating such marketing agency nor any agreement between such agencies, which has been approved by the Commission, nor any act done in pursuance thereof, by such agency or agencies, or the members thereof, and not in violation of the terms of the Commission's approval, shall be construed to be within the prohibitions of the antitrust laws of the United States.

Sec. 13. If any provision of this Act or the code provided herein, or any section, subsection, paragraph, or proviso, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act or code, and the application thereof to other persons or circumstances, shall not be affected thereby; and if either or any of the provisions of this Act or code relating to prices or unfair methods of competition shall be found to be invalid, they shall be held separable from other provisions not in themselves found to be invalid.

Other Duties of the Commission.

Sec. 14 (a) The Commission shall study and investigate the matter of increasing the uses of coal and the problems of its importation and exportation; and shall further investigate—

(1) The economic operations of mines with the view to the conservation of the national coal resources.

(2) The safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to utilize the services of the Bureau of Mines.

(3) The problem of marketing to lower distributing costs for the benefit of consumers.

(4) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of coal and methods of such control, including allotment of output to districts and producers within such districts and shall hold hearings thereon.

(b) The Commission shall annually report the results of its investigations under this section, together with its recommendations, to the Secretary of the Interior for transmission by him to Congress.

Sec. 15. Upon substantial complaint that coal prices are excessive, and oppressive of consumers, or that any district board, or producers' marketing agency, is operating against the public interest, or in violation of this Act, the Commission may hear such complaint, and its findings shall be made public; and the Commission shall make proper orders within the purview of this Act so as to correct such abuses. The Commission may institute proceedings under this section, and complaints may be made by any State or political subdivision of a State or by the consumers' counsel.

Sec. 16. To safeguard the interests of those concerned in the mining, transportation, selling, and consumption of coal, the Commission or the office of consumers' counsel is hereby vested with authority to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of coal, and to prosecute the same. Before proceeding to hear and dispose of any complaint filed by another than the Commission, involving the transportation of coal, the Interstate Commerce Commission shall cause the Commission and the office of consumers' counsel to be notified of the proceeding and, upon application to the Interstate

Commerce Commission, shall permit the Commission and consumers' counsel to appear and be heard. The Interstate Commerce Commission is authorized to avail itself of the cooperation, services, records, and facilities of the Commission.

Sec. 17. As used in this Act—

(a) The term "coal" means bituminous coal.

(b) The term "bituminous coal" includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

(d) The term "interstate commerce" means commerce among the several States and Territories, with foreign nations, and with the District of Columbia.

(e) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Sec. 18. Section 3 of this Act shall become effective on the first day of the second calendar month after the enactment of this Act, unless the Commission shall not at that time have promulgated the code and forms of acceptance for membership therein, in which event section 3 of this Act shall become effective from and after the date when the Commission shall have promulgated the code and such forms of acceptances, which date shall be promulgated by Executive order of the President of the United States.

All other sections except section 20 (a), of this Act shall become effective on the day of the approval of this Act.

Sec. 19. This Act shall cease to be in effect (except as provided in section 13 of the Revised Statutes) and any agencies and offices established thereunder shall cease to exist on and after four years from the date of the approval of this Act.

Sec. 20. (a) The Bituminous Coal Conservation Act of 1935 is hereby repealed, but such repeal shall not be effective until the consumers' counsel and a majority of the members of the Commission have been appointed.

(b) There is hereby authorized to be appropriated from time to time such sums as may be necessary for the administration of this Act. All sums heretofore or hereafter appropriated or made available to the National Bituminous Coal Commission and to the consumers' counsel of the National Bituminous Coal Commission established under the Bituminous Coal Conservation Act of 1935 are hereby transferred and made available for the uses and during the periods for which appropriated, in the administration of this Act by the National Bituminous Coal Commission and the office of the consumers' counsel herein created.

(c) The records, property, and equipment of the National Bituminous Coal Commission and the consumers' counsel, respectively, established under the Bituminous Coal Conservation Act of 1935 are hereby transferred to the Commission and the consumers' counsel, respectively, established under this Act.

Sec. 21. This Act may be cited as the Bituminous Coal Act of 1937.